

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

PHILLIP J. LYONS,

Plaintiff,

vs.

STATE OF NEVADA ex rel, c/o ORTIZ, et
al.,

Defendants.

Case No. 2:10-CV-00707-JCM-(LRL)

ORDER

Presently before the court is plaintiff Phillip J. Lyons' motion for disqualification of judge pursuant to 28 U.S.C. § 455(a). (Doc. #23). No opposition to this motion has been filed.

Under 28 U.S.C. § 144 and 455(a) and (b)(1), "[a] judge is required to disqualify himself if his impartiality might reasonably be questioned, or if he has a personal bias or prejudice for or against a party." *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1045 (9th Cir. 1987). Judicial bias or prejudice formed during current or prior proceedings is insufficient for recusal unless the judge's actions "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Pesnell v. Arsenault*, 543 F.3d 1044 (9th Cir. 2008); *Liteky v. United States*, 510 U.S. 540, 544-56 (1994). Judicial rulings will support a motion for recusal only "in the rarest of circumstances." *Id.* at 555; *United States v. Chischilly*, 30 F.3d 1144, 1149 (9th Cir.1994).

In the present motion (doc. #23), plaintiff alleges that the presiding judge has a "propensity...to render adverse decisions against plaintiff," and that he should recuse himself from the present case as well as two other cases before him to "avoid an[y] further appearance of impartiality." Lyons attempts to support his allegations with the fact that the Ninth Circuit Court of

1 Appeals filed a memorandum (doc. #144) in one of plaintiff's other cases, *Phillip J. Lyons VS*
2 *Patricia Leonhardt, et al.* (3:05-cv-00400-JCM-VPC), partially reversing a summary judgment
3 order against him on his deliberate indifference claim as to defendant Dr. John Scott, and on his
4 First Amendment claim as to defendants Jay Barth, Paul Lunkwitz, and Santerren Ward. In the
5 memorandum, the Ninth Circuit held that the summary judgment motion raised "a genuine issue of
6 material fact as to whether Lyons had a serious medical need arising from the abrupt cessation of his
7 prednisone medication and whether senior physician Dr. Scott was deliberately indifferent to that
8 need." (Doc. #144). The appellate court upheld this court's order granting summary judgment on all
9 other claims. *Id.*

10 In another related case, *Lyons v. State Of Nevada et al* (2:10-cv-01363-JCM-GWF), plaintiff
11 argues that his complaint was wrongly dismissed with prejudice, and that he "fully expects a
12 reversal and remand of that case by the higher court." (Doc. #23). In this court's screening order
13 (doc. #5), it held that plaintiff purported to seek declaratory judgment, but claimed Fourteenth
14 Amendment violations, which should be filed on a court approved form. LSR 2-1("A civil rights
15 complaint filed by a person who is not represented by counsel shall be on the form provided by this
16 court.").

17 Despite the plaintiff's failure to comply with the rules, the court reviewed the complaint and
18 determined that the plaintiff had failed to state a claim upon which relief could be granted. (Doc. #
19 5). Specifically, the court held that the plaintiff's Fourteenth Amendment claim challenging the
20 constitutionality of the kidnapping statutes was improper, because when a prisoner "raises a
21 constitutional challenge which could entitle him to an earlier release, his sole federal remedy is a
22 writ of habeas corpus." *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Young v. Kenny*, 907 F.2d 874
23 (9th Cir.1990), cert. denied 11 S.Ct. 1090 (1991). As the court found that "amendment would be
24 futile," it dismissed the complaint without leave to amend. (Doc. #5).

25 With regards to the present case, *Lyons v. State Of Nevada, et al.*
26 (2:10-cv-00707-JCM-LRL), plaintiff contends that the judge dismissed six of his seven counts
27 "simply because plaintiff did not amend his complaint during the time in which plaintiff's rule 60
28 motion for review (doc. #15) was pending decision by this court." (Doc. #17). However, the court

1 ordered (doc. #11) that “[p]laintiff will have thirty (30) days from the date that this order is entered
2 to submit his amended complaint, if he believes that he can correct the noted deficiencies. *Failure to*
3 *comply with this order will result in the dismissal of counts 1, 2, 3, 4, 5, and 7 from this action.*”
4 (Emphasis added). As plaintiff concedes, he failed to amend his complaint as ordered, and the court
5 held that since he did not take the opportunity, the court “will not re-write those counts for him,” but
6 “will dismiss those counts.” (Doc. #17).

7 The judge’s rulings on a prior proceeding in this case and others filed by the plaintiff do not
8 support a finding that the judge possesses a “deep-seated favoritism” or personal bias against the
9 plaintiff, and do not rise to a level that would be sufficient to warrant recusal or reassignment.
10 *Pesnell*, 543 F.3d 1044; *Liteky*, 510 U.S. 540, 544-56. To the contrary, each of the judge’s rulings
11 were objective and provided the plaintiff, where appropriate, the ability to cure defects in his
12 complaint and the necessary information regarding the proper remedy to seek. Without a finding of
13 bias or favoritism, this court is not inclined to grant the motion for disqualification.

14 Accordingly,

15 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the plaintiff Phillip J.
16 Lyons’ motion for disqualification of judge pursuant to 28 U.S.C. § 455(a) (doc. #23) be, and the
17 same hereby is, DENIED.

18 DATED May 3, 2011.

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21 UNITED STATES DISTRICT JUDGE
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